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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 PERFECT 10, INC., a California
Corporation ,

14 Plaintiff,

15 v.

16 GIGANEWS, INC., a Texas Corporation;
17 LIVEWIRE SERVICES, INC., a Nevada
Corporation; and Does 1 through 100,
18 inclusive,

19 Defendant.

20 GIGANEWS, INC., a Texas Corporation;
21 LIVEWIRE SERVICES, INC., a Nevada
Corporation,

22 Counterclaimants,

23 v.

24 PERFECT 10, INC., a California
25 Corporation,

26 Counterdefendant.

Case No.: 11-cv-07098-AB (SHx)

**DEFENDANTS GIGANEWS, INC.
AND LIVEWIRE SERVICES,
INC.'S NOTICE OF MOTION AND
MOTION FOR AWARD OF
ATTORNEY'S FEES AND
EXPENSES**

Date: February 2, 2015
Time: 10:00 A.M.
Courtroom: 790 Roybal
Judge: Hon. André Birotte, Jr.

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NOTICE OF MOTION FOR AWARD OF ATTORNEY'S FEES
TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

DEFENDANTS GIGANEWS, INC. AND LIVEWIRE SERVICES, INC.
 GIVE NOTICE THAT ON that, on February 2, 2015 at 10:00 A.M., or as soon
 thereafter as feasible, in Courtroom 790 of the United States District Court for the
 Central District of California, located at 255 East Temple Street, Los Angeles, CA
 90012-3332, Defendants Giganews, Inc. and Livewire Services, Inc., will, and
 hereby do, move for an order granting Defendants their reasonable attorney's fees
 and other recoverable expenses in this matter. Defendants base this motion on this
 notice; the memorandum in support; the declarations of Andrew P. Bridges, Peter
 D. Zeughauser, Todd R. Gregorian and their exhibits; all other pleadings and papers
 on file in this action; any matters of which this Court may take judicial notice, and
 any other evidence and argument as counsel may present at or before the hearing on
 this matter. This motion follows a conference of counsel pursuant to L.R. 7-3
 which took place on November 18, 2014.

Dated: December 29, 2014

FENWICK & WEST LLP

By: /s/Andrew P. Bridges
 Andrew P. Bridges

Attorneys for Defendants
 GIGANEWS, INC., and
 LIVEWIRE SERVICES, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As the Court recognized in its summary judgment orders, Perfect 10 could have avoided this litigation in a matter of minutes by submitting to Defendants proper notifications of claimed infringement. Instead, Perfect 10's CEO, a veteran of dozens of lawsuits but a non-lawyer with no professional standards to influence him, pursued this case with blind passion and greed, relying on a series of outrageous and false statements and baseless arguments, including claims that Defendants *themselves* uploaded infringing messages to Usenet. Plaintiff waged an extraordinary campaign of three and a half years, taking step after step to create litigation chaos, with enormous burdens and expenses for Defendants, while seeking catastrophic statutory damages (without actual damage) and injunctions. Perfect 10 is a unique litigant. Sadly, this is not a unique case: Perfect 10 has shown no signs of letting up, and it will not curb its litigation misbehavior unless this Court demonstrates that courts will not idly indulge Perfect 10's misbehavior.

Defendants prevailed completely in this case, obtaining final judgment on the merits. Defendants won dismissal of Perfect 10's trademark, right of publicity, and unfair competition claims, and summary judgment on its copyright claims—a determination as a matter of law that out of the nearly 20,000 works Perfect 10 claimed, Defendants did not infringe a single Perfect 10 copyright. Three district judges (Judges Matz, Collins, and Birotte) ruled unanimously against Perfect 10's copyright theories. A fourth judge, in the Southern District of California, saw through Perfect 10's forum shopping at the outset and sent the case to this Court. At every significant turn, the Court has ruled against Perfect 10. Nor is it alone in doing so. The Court of Appeals for the Ninth Circuit, in Perfect 10's other cases involving CCBill, Google, and Amazon.com, have also ruled against Perfect 10 on every appeal. They have made clear rulings that Perfect 10 has steadfastly ignored. Both the facts of this case and the relevant legal standards call out for an award to

1 Defendants of their attorney's fees and expenses.

2 The fees that Defendants request are reasonable in light of the scope and
3 complexity of the case and Perfect 10's tireless and constant attempts to drive up
4 the expense. Perfect 10's complaint threatened statutory damages of potentially
5 billions of dollars, and only after three years of litigation did Perfect 10 reveal that
6 it considered the settlement value of the case to be over \$51 million. For Perfect
7 10, litigation gamesmanship and the costs it imposes are the engine for the
8 settlements that are at the heart of its business plan. Defendants incurred
9 reasonable expense to defend this case. Anything less than a full award of fees to
10 Defendants will penalize Defendants for seeing this case to a conclusion on the
11 merits. Anything less than a full award will encourage Perfect 10 to continue to
12 pursue its wrongful objective: using the prospect of outrageous litigation claims and
13 tactics to extract unwarranted payments.

14 **II. FACTUAL AND PROCEDURAL BACKGROUND**

15 Plaintiff Perfect 10 is a failed publisher of an adult magazine and website and
16 a serial litigant best known for its copyright infringement lawsuits. Perfect 10 has
17 sued a variety of companies including Visa and MasterCard, Google, Amazon.com,
18 Tumblr, and Microsoft, attempting to hold each liable for the copyright
19 infringements of individual Internet users. In this case, Perfect 10 sued two
20 providers of Usenet access, alleging: (1) direct and indirect copyright infringement,
21 based on Perfect 10's allegation that the Usenet contains material that infringes its
22 copyrights; (2) trademark infringement and dilution based upon Defendants'
23 provision of Usenet messages that allegedly contain Perfect 10's marks; (3) unfair
24 competition; and (4) violation of rights of publicity Perfect 10 claimed to have
25 acquired from its models. Dkt. 1, ¶ 74. Perfect 10's behavior over the three and a
26 half years of the case reveals a single-minded drive to increase litigation expense
27 and to intimidate Defendants into paying enormous sums to settle the case.

28 ***Improper Venue.*** Perfect 10's gamesmanship began when it brought this

1 action in an improper venue. Perfect 10 had previously filed approximately two
2 dozen cases in the Central District of California, where it resides. Dkt. 56 at 2.
3 After several defeats in this Court, however, Perfect 10 filed this case in the
4 Southern District of California. The Southern District of California rejected Perfect
5 10's forum shopping, finding that "Perfect 10 has failed to show [a] specific
6 connection to the Southern District" and noting that the "mere fact that Perfect 10
7 has a website does not provide a nexus to the Southern District." *Id.* Perfect 10
8 also later opposed a related-case assignment in this District without basis. Dkt. 62.

9 ***Preliminary Injunction.*** In another case, the Ninth Circuit in 2011 affirmed
10 denial of Perfect 10's motion for preliminary injunction against Google, ruling that
11 Perfect 10's accusations of infringement against many companies made it unable to
12 show irreparable harm at Google's hands. *See Perfect 10, Inc. v. Google, Inc.*, 653
13 F.3d 976 (9th Cir. 2011). The ruling effectively established that Perfect 10 was
14 unable to show irreparable harm at the hands of any company. Nonetheless, Perfect
15 10 sought an onerous preliminary injunction against Defendants in this case,
16 recycling its arguments of irreparable harm. In denying Perfect 10's motion, Judge
17 Matz noted that Perfect 10 did not address the Ninth Circuit's ruling in its briefing,
18 even though Defendants relied on *Google* in their opposition. Dkt. 88, at 2.
19 Following *Google*, the Court held that Perfect 10's claim that 150 other entities had
20 infringed upon its images meant an injunction against Defendants would not
21 prevent any supposed irreparable injury. *Id.* The Court further found no irreparable
22 harm because Perfect 10 ceased publication of its magazine years before and
23 submitted no evidence it had ever turned a profit. *Id.*

24 ***Motions to Dismiss.*** The Court noted that Perfect 10's original Complaint
25 was "marred by excessively conclusory language" (Dkt. 97, at 1) that "obscures"
26 the facts regarding Defendants' alleged conduct. *Id.* at 2. Defendants moved to
27 dismiss because of those and other defects in Perfect 10's pleading. Perfect 10
28 asserted claims for copyright infringement against Defendants based on

1 Defendants' provision of Usenet access to their customers. Dkt. 1, ¶¶ 36-37.

2 Perfect 10 alleged:

3 Defendants sell to their customers for as little as \$4.99
4 per month access to their servers, which are virtual
5 warehouses containing billions of dollars worth of
6 copyrighted works.

7 *Id.* at ¶ 24. Perfect 10 acknowledged, however, that "Defendants purportedly copy
8 all of the materials on their servers from a global system of online bulletin boards
9 called the USENET." *Id.* The Court (Judge Matz then presiding) granted
10 Defendants' motion to dismiss, rejecting Perfect 10's direct infringement claims.
11 Dkt. 97 at 13. The Court concluded that "copyright infringement requires 'some
12 element of volition or causation which is lacking where a defendant's system is
13 merely used to create a copy by a third party.'" *Id.* (citing *Netcom*, 907 F. Supp. at
14 1370) (internal quotation omitted). Applying that principle to the facts that Perfect
15 10 had alleged, the Court concluded that "Defendants merely engaged in the act of
16 designing and implementing a system that automatically and uniformly creates
17 temporary copies of all data sent through it, whether that data contains infringing
18 content or not. Such conduct does not constitute any volitional act." *Id.* at 11
19 (internal citation and quotation omitted). The Court warned Perfect 10 that any
20 amended complaint should not "use the same vague and conclusory language that
21 plagued the original complaint." *Id.* at 24. The Court also held that Perfect 10 had
22 adequately pled its claims of contributory and vicarious copyright infringement
23 against Giganews, but it dismissed those claims against Livewire. *See id.* at 13-19.

24 Perfect 10's original complaint also alleged multiple additional claims
25 (Dkt. 1 ¶¶ 48-78) that the Court dismissed:

- 26 • Perfect 10 did not adequately plead its claims for direct trademark
27 infringement, secondary trademark infringement, and trademark dilution,
28 because it failed to set forth any allegation of trademark "use" by Defendants

1 or third-parties;

- 2 • The Communications Decency Act of 1996 (“CDA”), 47 U.S.C § 230,
3 provided Defendants immunity against Perfect 10’s claims of publicity
4 violations under the California statute, right of publicity violations under
5 California common law, and unfair competition under California statutes.
6 Dkts. 11 & 97 at 19-24.

7 In its Amended Complaint, Perfect 10 repeated its boilerplate allegations
8 regarding Defendants’ provision of Usenet access, requiring a further motion to
9 dismiss to address the same infringement theories the Court had already rejected.
10 *See* Dkts. 111 & 129 at 3 (“it is clear that these allegations cannot support [a] claim
11 for direct infringement”). The Court, however, allowed Perfect 10 to proceed based
12 on new, and scurrilously false, allegations that *Giganews employees* had *themselves*
13 directly uploaded infringing materials. *Id.* The Court noted that Perfect 10 had
14 made these allegations on information and belief and characterized them as “not the
15 strongest set of allegations.” *Id.* at 4.

16 ***Perfect 10’s Early Motion for Summary Judgment.*** Perfect 10 moved on
17 November 4, 2013, for partial summary judgment on issues relating to Defendants’
18 affirmative defenses, namely the DMCA compliance of Perfect 10’s takedown
19 notices and purported ineligibility of Defendants for DMCA safe harbor. Dkt. 142.
20 The Court denied the motion entirely. Dkt. 180 at 2. The Court also noted that
21 Perfect 10’s “voluminous evidentiary objections” were “substantially meritless.”
22 *Id.* at 5. Perfect 10 later tried to overcome this failure with a motion for sanctions
23 pursuant to Fed. R. Civ. P 56(h), accusing *all of Defendants’ witnesses* of filing
24 false declarations. Dkt. 325. The Court termed the motion “ill-considered and
25 overreaching” and denied it as meritless. Dkt. 343.

26 ***Discovery.*** Perfect 10’s intransigence in discovery forced Defendants to
27 obtain numerous orders against it. *See* Dkts. 223, 254, 311, & 326. The Court also
28 issued orders against Perfect 10-affiliated witnesses, whom Perfect 10’s counsel

1 represented, for acts that ranged from insufficient responses to willful misconduct.
2 *See* Dkts. 312, 320 & 342. By contrast, the Court substantially or entirely denied
3 Perfect 10's motions to compel and for discovery sanctions. *See* Dkts. 216, 295,
4 316, & 412. Perfect 10's noncompliance with its discovery obligations was bold, as
5 detailed in Defendants' pending sanctions motion (Dkt. 356):¹

- 6 • Perfect 10 made an unsolicited dump of 800,000 pages before Defendants
7 had sent any discovery requests, and then it refused to disclose how it
8 selected those materials for production or how they related to Defendants'
9 later discovery requests. Perfect 10 then made multiple representations as to
10 the "completeness" of its production both before and after motion practice
11 that, on investigation, turned out to be false.
- 12 • In spite of the Court's orders, Perfect 10 refused to disclose evidence
13 supporting the basic elements of its claims, including: identification of the
14 copyrighted works asserted in the case, the Usenet messages and websites it
15 alleged infringe its copyrights, its claimed evidence that Defendants posted
16 infringing materials to Usenet, and its claimed evidence that the presence of
17 Perfect 10 images on Usenet acts as a draw for any Usenet subscriber.
- 18 • Also contrary to Court order, Perfect 10 sought to preclude investigation of
19 its activities on the Usenet, refusing to fully disclose its Usenet accounts, IP
20 addresses, email addresses, and advertising and promotional efforts. And
21 Perfect 10 sought to preclude investigation of its past litigation activity and
22 positions, refusing to identify all those lawsuits and to produce all related
23 declarations, deposition transcripts, and expert reports.
- 24 • None of the Perfect 10 affiliated witnesses complied with the Court's orders
25 directing their searches for documents. Instead, they withheld responsive

26 ¹ Defendants' Motion for attorney fees related to their discovery briefing remains
27 pending. *See* Dkt. 638. Defendants do not seek a double-recovery of their fees: to
28 the extent Magistrate Judge Hillman issues an award, Defendants will withdraw
their request for reimbursement of the corresponding fees he awards from this
motion.

1 documents at their own discretion, excluded electronic search terms that the
2 Court specifically ordered, or searched a selective subset of their electronic
3 files. Most did not conduct manual searches or provide sworn declarations
4 including the details of their search that the Court ordered them to provide.
5 One flatly refused to provide IP address information as the Court had
6 ordered. *Nevertheless, Perfect 10's counsel submitted declaration testimony*
7 *under penalty of perjury that these witnesses had fully complied with the*
8 *Court's orders.*

- 9 • Perfect 10's technical consultants Sean Chumura and Szabolcs Apai gave
10 repeated, sworn testimony that they had no responsive documents because
11 they had lost or destroyed their files. But on the final day of fact discovery,
12 well after their depositions, each produced thousands of pages of responsive
13 documents that exposed the falsehood of their testimony.

14 Perfect 10 also misbehaved during expert discovery. Perfect 10 designated
15 three putative expert witnesses, Richard Waterman, J. Douglas Tygar, and Norman
16 Zada. Each of these witnesses offered opinions that were irrelevant, beyond their
17 expertise, or impermissible lay opinions. For example, Mr. Zada sought to qualify
18 himself as an expert on the Usenet based on his experience as a user, and as an
19 expert on DMCA notice and takedown procedures based on his experience of
20 having sent takedown notices. He also sought to offer purported "expert" opinions
21 regarding the credibility of Defendants' witnesses. Mr. Waterman sought to opine
22 regarding the current prevalence of infringement of images on the Usenet based on
23 an obsolete study regarding music. Facing the threat of Daubert motions, Perfect
24 10 suggested it might withdraw some of its "expert" opinions but did not. Only
25 after Defendants paid to prepare and file Daubert motions did Perfect 10 voluntarily
26 withdraw substantial portions of the testimony of two of its putative experts (Dkt.
27 526 at 3; Dkt. 525 at 3), and ever evasive, it substituted a new declaration by the
28 third, long after the deadline, to assert previously undisclosed opinions. Dkt. 524-1.

1 Ultimately, the Court granted Defendants' motions and barred Mr. Zada from
2 testifying as an expert. Dkts. 580-582.

3 **Summary Judgment.** Disregarding the Court's denial of its earlier motion
4 for partial summary judgment (Dkt. 180), Perfect 10 again moved on the same issue
5 of the adequacy of its DMCA notices to Defendants. Dkt. 449. In addition, Perfect
6 10 moved for partial summary judgment concerning direct copyright infringement
7 (Dkt. 453) and indirect copyright infringement (and Giganews's alleged
8 ineligibility for DMCA safe harbor). Dkt. 504. Defendants brought a total of four
9 motions for partial summary judgment as to direct copyright infringement (Dkt.
10 357); indirect copyright infringement (Dkt. 440); adequacy of Perfect 10's
11 notifications of claimed infringement (Dkt. 534); and statutory damages. Dkt. 535.

12 The Court granted Defendants' motions with respect to direct and indirect
13 infringement and denied all other summary judgment motions as moot. Dkts. 619-
14 21. Ruling on direct infringement, the Court noted Perfect 10's resurrection of
15 rejected legal theories:

16 In an implicit admission that the facts before the Court are no different
17 than the allegations Judge Matz and Judge Collins previously rejected,
18 Perfect 10 repeatedly urges the Court to depart from Judge Matz' and
19 Judge Collins' prior rulings.

20 Dkt. 619 at 15; *see also id.* at 16. The Court also recognized that Perfect 10 had
21 produced no evidence on the direct infringement allegations that had caused Judge
22 Collins to allow the claim to proceed, namely that Defendants or their employees
23 uploaded Perfect 10 materials to Usenet. *Id.* at 12. The allegations were false.

24 On the vicarious and contributory infringement claims the Court found no
25 probative evidence tended to show that Giganews received a direct financial benefit
26 from infringement of Perfect 10 copyrighted material or had knowledge of any
27 specific infringing Perfect 10 material on its servers. Dkt. 620 at 14. The Court
28

1 also commented on Perfect 10's practice of submitting hundreds of inadequate
2 takedown notices:

3 Not only did Perfect 10 submit illegible Message-IDs for the 542
4 messages it claims Giganews refused to take down, but when
5 Giganews asked Perfect 10 to resubmit the Message-IDs in a legible
6 format so that Giganews could block access to the infringing
7 messages (as Giganews had done with thousands of other messages in
8 response to Perfect 10's takedown notices) Perfect 10 refused to do
9 what was well within its power.

10 Even more puzzling, Perfect 10 also admits that it is aware of and
11 capable of using an infinitely simpler method of presenting Giganews
12 with readily identifiable Message-IDs for use in a proper takedown
13 notice . . . Perfect 10 did not take that simple step to protect its
14 copyrights.

15 *Id.* at 12-13. The Court entered final judgment in Defendants' favor on all claims.
16 Dkt. 628. Undeterred, Perfect 10 pursues reconsideration of the Court's summary
17 judgment orders. *See* Dkt. 627.

18 **III. ARGUMENT**

19 **A. DEFENDANTS SHOULD RECOVER ATTORNEY'S FEES** 20 **THEY INCURRED DEFENDING AGAINST ALL CLAIMS.**

21 Defendants prevailed on all of Perfect 10's asserted claims: copyright
22 infringement, trademark infringement, right of publicity, and unfair competition.
23 Although the parties spent most of the case litigating the copyright claims,
24 Defendants also incurred substantial early expense to defeat Perfect 10's other
25 aggressive claims. In addition, Defendants prevailed on major procedural issues,
26 including defeating Perfect 10's improper venue and its preliminary injunction
27 motion. Under the applicable standards the Court should award fees on all claims
28 with the exception of those associated only with the unfair competition claim.

1 **1. The Court Should Award Fees Under the Copyright Act.**

2 The Copyright Act permits a district court to “award a reasonable attorney’s
3 fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. Prevailing
4 plaintiffs and prevailing defendants get equal treatment: the court should award fees
5 when the prevailing party’s successful prosecution or defense of a claim furthers
6 the purpose of the Copyright Act. *See Fogerty v. Fantasy*, 510 U.S. 517, 534
7 (1994) (“*Fogerty I*”); *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996)
8 (“*Fogerty II*”) (“Faithfulness to the purposes of the Copyright Act is. . . the pivotal
9 criterion”).

10 [E]xceptional circumstances are not a prerequisite to an award of
11 attorneys fees; district courts may freely award fees, as long as they
12 treat prevailing plaintiffs and prevailing defendants alike and seek to
13 promote the Copyright Act’s objectives.

14 *Historical Research v. Cabral*, 80 F.3d 377, 378 (9th Cir. 1996) (citation and
15 internal quotation omitted). The purposes of the Copyright Act “[are] furthered
16 when defendants ‘advance a variety of meritorious copyright defenses.’” *Mattel,*
17 *Inc. v. MGA Entm’t, Inc.*, 705 F.3d 1108, 1111 (9th Cir. 2013).

18 Several factors guide a district court’s determination of whether a fee award
19 furthers the Copyright Act’s purposes: (1) the degree of success obtained;
20 (2) frivolousness; (3) motivation; (4) objective unreasonableness (both in the
21 factual and in the legal components of the case); and (5) the need, in particular
22 circumstances, to advance considerations of compensation and deterrence. *See*
23 *Entm’t Research Grp. v. Genesis Creative Grp.*, 122 F.3d 1211, 1229 (9th Cir.
24 1997) (citing *Fogerty II*). Not all factors must be present: “[c]ourts have awarded
25 costs for copyright claims based on a single factor.” *See Robinson v. Lopez*, No.
26 CV 03-3732 LGB (PLAx), 2003 WL 2316906, at *2, 69 U.S.P.Q.2d (BNA) 1241
27 (C.D. Cal. Nov. 24, 2003) (citing *Fogerty II*, 94 F.3d at 558). Unusually in this
28 case, *all* five factors weigh in favor of an award.

a. Defendants Obtained a Complete Merits Victory.

The first factor, the degree of success obtained, weighs in favor of any defendant that was “completely successful against the copyright claims.” *Love v. The Mail on Sunday*, No. CV05-7798 ABC (PJWX), 2007 WL 2709975, at *5 (C.D. Cal. Sep. 7, 2007)(“*Love I*”). This factor “weighs more in favor of a party who prevailed on the merits rather than a technical defense.” *Duckhole v. NBC Universal Media LLC*, No. CV 12-10077-BRO, 2013 WL 5797204, at *2 (C.D. Cal. Oct. 25, 2013); *see also Bernal v. Paradigm Talent and Literary Agency*, No. CV 07-06445 SVW (PLAx), 2010 WL 6397561, at *3 (C.D. Cal. Jun. 1, 2010). Here, Defendants prevailed against all of Perfect 10’s copyright claims, establishing as a matter of law that they committed neither direct nor indirect copyright infringement. Dkts. 619 & 620. This merits victory, which thwarted Perfect 10’s attempts to reverse the Ninth Circuit’s mandate placing responsibility to copyright policing on copyright holders, to manufacture liability from deliberately defective notices, and to expand the contours of direct and indirect liability for copyright infringement, and which protected a core component of the Internet and forum for free speech, furthered the purposes of the Copyright Act. This weighs strongly in favor of an award.

b. Perfect 10 Persisted in Frivolous and Unreasonable Positions.

“Allegations that are unsupported by facts or law are objectively unreasonable.” *Batjac Prods., Inc. v. Goodtimes Home Video Corp.*, No. CV 96-7416 DDP, 1997 WL 7455039, at *3 (C.D. Cal. Sept. 26, 1997). A party cannot reasonably maintain a factual allegation throughout litigation without evidentiary support. *See Entm’t Research Grp.*, 122 F.3d at 1229 (upholding award where “it was ‘objectively unreasonable’ for [plaintiff] to have maintained [copyright] claims for almost three years without evidentiary basis”); *Scott v. Meyer*, No. CV 09-6076 ODW (RZx), 2010 WL 2569286, at *3 (C.D. Cal. Jun. 21, 2010) (noting courts

1 have held “the maintenance of copyright claims for protracted period of a time
2 without evidentiary support” to be “objectively unreasonable”). A case crosses the
3 line from unreasonable to frivolous where “the result is obvious or the arguments
4 are wholly without merit.” *Glass v. Sue*, No. CV 09-8570-RGK (SHx), 2011 WL
5 5611028, at *3 (C.D. Cal. Feb. 8, 2011). A case is also frivolous if “the factual
6 contention is clearly baseless.” *Perfect 10, Inc. v. Visa Int’l Servs. Ass’n*, No. C 04-
7 00371 JW, 2005 WL 2007932, at *4 (N.D. Cal. Aug. 12, 2005).

8 Pervasively throughout the case Perfect 10 asserted unreasonable and
9 frivolous positions. The Court observed that Perfect 10 made no attempt to support
10 its sole viable direct infringement theory with evidence. Instead Perfect 10 forced it
11 to rule three times that the mere provision of Usenet access does not constitute
12 direct infringement. *See* Dkt. 619 at 12 (“Although Perfect 10 repeats the
13 arguments Judge Matz and Judge Collins already rejected, the record is devoid of
14 any evidence to support the only theory of direct liability as to Giganews that
15 survived the pleading stage.”). Notwithstanding the absence of evidence, Perfect
16 10 refused to abandon the direct infringement claim at the close of discovery. *See*
17 Gregorian Decl., Ex. 1. Maintaining the claim with no evidentiary support was
18 itself unreasonable; moving for summary judgment on this claim based on a theory
19 that the Court had already rejected twice (and opposing Defendants’ motion on the
20 same grounds) was frivolous.

21 Perfect 10 also pursued its indirect infringement claim despite a similar lack
22 of evidentiary support. The Court found the record:

- 23 • “devoid of any evidence that Giganews had the necessary knowledge of
24 specific third-party infringement to support a claim for contributory
25 infringement;”
- 26 • “lack[ing] . . . a single piece of evidence” indicating that Perfect 10 images
27 cause customers to subscribe to Giganews; and
- 28 • without “any competent evidence to suggest that infringement of other forms

1 of media is rampant on Giganews's servers."

2 Dkt. 620 at 1, 5, 7 & 9. Moreover, Perfect 10 recycled failed theories on summary
3 judgment that the Court had already rejected. *See, e.g.*, Dkt. 620 at 11. Perfect 10's
4 continued prosecution of a claim for which it lacked any evidence on multiple
5 elements was unreasonable and frivolous.

6 Finally, Perfect 10 burdened the Court and Defendants with a series of
7 frivolous objections and discovery motions. Magistrate Judge Hillman issued four
8 separate orders requiring Perfect 10 to comply with discovery obligations and two
9 additional orders requiring the same of Perfect 10-related witnesses whom Perfect
10 10's counsel represented. *See* Dkts. 223, 254, 311, 326, 318, 322, and 326. Perfect
11 10 filed a series motions for sanctions that it lost, one of which the Court described
12 as "meritless" "entirely unpersuasive," and "ill-conceived and overreaching." Dkt.
13 343 [July 14, 2014 Civil Minutes] at 1. The Court described another motion as
14 involving mere "technical" problems, and specified that Perfect 10 should bear the
15 cost of any technical assistance because the discovery sought was "highly unlikely
16 to yield information that will advance plaintiff's case." Dkt. 295 at 4. Perfect 10
17 never sought the technical assistance when it faced the burden of paying for it,
18 revealing that it simply had wanted to impose additional burdens on Defendants.
19 *See* Dkt. 344-6 [Belichick Decl.], ¶ 4; *see also* Dkt. 412 ("The Motion is Denied.
20 In sum Perfect 10 has the ability to obtain the information it desires, and Giganews
21 is not obstructing Perfect 10's efforts").

22 **c. Perfect 10 Pursued The Case with an Improper**
23 **Motive.**

24 Perfect 10's evident goal in this suit was to force settlement before the Court
25 adjudicated the merits. The Court observed that Perfect 10 could have ensured the
26 prompt removal of any messages with its images from Giganews's servers if it had
27 any interest in doing so:

28 Had Perfect 10 performed its own investigative duties, extracted the

1 Message-IDs, and submitted those Message ID's [] in a machine-
2 readable format, there would be little left to discuss in this case.

3 Dkt. 620 at 13. By its own admission Perfect 10 could have taken that step in
4 minutes. *See* Gregorian Decl., Ex. 2 [Perfect 10 30(b)(6) Depo.] at 207:22 - 208:13
5 (estimating 15 minutes to extract Message ID's for 90% of allegedly infringing
6 Usenet messages). This choice makes no sense for a party seeking to protect its
7 copyrights, but it perfectly fits one whose business model rests on litigation.

8 Perfect 10 has never been profitable as a business; according to Perfect 10's
9 CEO, it has lost over \$50 million (which losses, while also funding Mr. Zada's
10 lavish mansion and lifestyle, are passed through to Mr. Zada's personal income
11 taxes to offset his enormous hedge fund profits because Perfect 10 is an S
12 corporation). Gregorian Decl., Ex. 3 [April 24 Zada Depo.] at 159:7-21; Ex. 5
13 [August 24 Zada Depo.] at 247:15-248:11; Ex. 6 [June 5 Chaney Depo.] at 50:20-
14 51:10. After more than a decade in business, Perfect 10 has generated less than
15 \$12,000 from the licensing of its images, and its website has only 1,200 active
16 subscribers. *Id.*, Ex. 3 at 212:18 - 213:2; Ex. 4 [April 25 Zada Depo.] at 563:5-6.
17 Perfect 10 now spends a negligible amount of time—only forty hours *per year* –
18 producing new works. *Id.*, Ex. 4 at 539:25-541:4. Nor does Perfect 10 employ
19 measures to prevent its own customers from downloading and disseminating
20 images, essentially courting infringement. *Id.*, Ex. 3 at 76:18- 79:21.

21 Instead, Perfect 10 generates its revenue through litigation settlements
22 (Gregorian Decl., Ex. 3 [April 24 Zada Depo.] at 161:24-162:5), and the
23 overwhelming majority of its employee time and financial resources supports the
24 litigation business. *Id.*, Ex. 4 [April 25 Zada Depo.] at 539:25-541:4; *see also* Ex. 3
25 [April 24 Zada Depo.] at 84:1-4 (Zada's primary role as CEO is litigation
26 management); *id.* at 162:6-163:9 (litigation Perfect 10's largest expense). Perfect
27 10 has acquired copyrights to images for the purpose of improving its litigation
28 position, and it routinely buys the copyrights to images it discovers on allegedly

1 infringing websites. *Id.*, Ex. 3 at 38:19-42:17. As part of its strategy, Perfect 10
2 provides DMCA notices that courts have criticized as noncompliant and overly
3 burdensome, and for which Perfect 10's own lawyers disclaim responsibility. *See*
4 *Perfect 10, Inc. v. CC Bill, LLC*, 488 F.3d 1102, 1111-13 (9th Cir. 2007); *see also*
5 *Gregorian Decl.*, Ex. 3 [April 24 Zada Depo.] at 93:2-95:3.

6 Courts facing litigants who similarly use the Copyright Act as a payment-
7 extraction vehicle have little difficulty finding improper motive. *See Video-Cinema*
8 *Films, Inc. v. CNN, Inc.*, Nos. 98 Civ. 7128, 98 Civ. 7129, 98 Civ. 7130, 2003 U.S.
9 Dist. LEXIS 4887, at *15-16 (S.D.N.Y. Mar. 31, 2003) (motive improper where
10 plaintiff purchased copyrights for the purpose of bringing suit, and describing
11 conduct as "nothing more than an obvious effort to use the Copyright Act to secure
12 payment" from parties with a valid defense); *see also Duckhole*, 2013 WL
13 5797204, at *2 (considering extensive litigation history of plaintiff's CEO as
14 evidence of improper motivation). Perfect 10's motivation of securing windfall
15 settlements undermines the purposes of the Copyright Act, and it weighs heavily in
16 favor of granting Defendants their attorney's fees and expenses.

17 **d. The Court Should Award Fees to Compensate**
18 **Defendants and Deter Perfect 10 from Continuing its**
Campaign of Unmeritorious Suits.

19 "Deterring non-meritorious lawsuits against defendants seen as having 'deep
20 pockets' and compensating parties that must defend against meritless claims are
21 both laudable ends." *Scott*, 2010 WL 2569286, at *3. The need both to
22 compensate and to deter is greatest where a plaintiff's tactics have unnecessarily
23 driven up costs. *See Love I*, 2007 WL 2709975, at * 5 ("[T]here is a need in this
24 case ...to deter Plaintiffs from advancing unsupportable claims. ... Plaintiff's case
25 was vastly overpled, thus unnecessarily expanding the Defendants' (and this
26 Court's) work.").

27 Perfect 10 has filed over 30 copyright lawsuits, each seeking astronomical
28 statutory damages and often seeking injunctions that would require the defendants,

1 at least temporarily, to cease providing services. Gregorian Decl. Ex. 3, [April 24
2 Zada Depo.] at 10:19-11:7. Perfect 10 has never won a damage award in a
3 contested case. *Id.* at 166:4-17. Moreover, because Perfect 10 seeks to force
4 settlements, Perfect 10 does everything in its power to drive up costs, posing
5 substantial burdens on defendants. For example, as discussed above, Defendants
6 could not obtain Perfect 10's discovery compliance even after six discovery orders
7 from this Court. Defeating Perfect 10's direct infringement claims required cross-
8 motions for summary judgment, even though Perfect 10 had developed no evidence
9 to support its claim. The Ninth Circuit has recognized that "[w]hen a fee award
10 encourages a defendant to litigate a meritorious [defense] against an unreasonable
11 claim of infringement, the policies of the Copyright Act are served." *SOFA Entm't,*
12 *Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1280 (9th Cir. 2013). Here, Defendants
13 should receive compensation for the costs of litigating their meritorious defenses,
14 and the Court should deter Perfect 10 from asserting future meritless claims.

15 In sum, all of the *Fogerty* factors favor an award of fees in this case.

16 **2. The Court Should Award Fees Under the Lanham Act.**

17 The Lanham Act provides reasonable attorney's fees to the prevailing party
18 in exceptional cases. 15 U.S.C. § 1117(a). In *Octane Fitness*, the Supreme Court
19 reviewed the standard under Section 285 of the Patent Act, holding that "an
20 'exceptional' case is simply one that stands out from others with respect to the
21 substantive strength of a party's litigating position (considering both the governing
22 law and the facts of the case) or the unreasonable manner in which the case was
23 litigated." *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749,
24 1756 (2014). In making that holding, the Court noted that the Lanham Act's fee-
25 shifting provision is identical to the Patent Act's, and since then courts have applied
26 the *Octane Fitness* standard to fees requests under the Lanham Act. *See id*; *Fair*
27 *Wind Sailing, Inc. v. Dempster*, 764 F.3d 303, 314-15 (3d Cir. 2014).² A prevailing

28 ² Before *Octane Fitness*, the Ninth Circuit identified a number of circumstances that
DEFENDANTS' NOTICE OF MOTION AND
MOTION FOR AWARD OF ATTORNEY'S
FEES AND EXPENSES

1 defendant need not show evidence of bad faith to recover. *Stephen W. Boney, Inc.*
2 *v. Boney Servs., Inc.*, 127 F.3d 821, 827 (9th Cir. 1997).

3 Perfect 10 based all of its trademark claims on the bare allegation that
4 Defendants provide Usenet access services. *See* Dkt. 1 [Complaint] at ¶ 54
5 (“Defendants infringe Perfect 10 trademarks by providing lists of titles containing
6 such marks when a user searches for one of Perfect 10’s copyrighted works”); *see*
7 *also id.* at ¶ 62. Under well-settled law, that does not constitute trademark use. As
8 Judge Matz noted, “[t]he Court is unaware of any authority that would support such
9 a broad construction of direct trademark infringement law, and Plaintiff does not
10 cite any.” Dkt. 97 at 20. Similarly, in connection with Perfect 10’s secondary
11 liability claim, the Court stated that “Plaintiff’s Complaint is bereft of any
12 allegations that a third party used Plaintiff’s marks in connection with a commercial
13 transaction.” *Id.* at 2. As the Court noted, Perfect 10 knew from its own earlier
14 cases that “use” of its trademark was an essential element. *See id.* at 21 n.10.
15 Perfect 10’s trademark claim was meritless and, in the context of its litigation
16 practices throughout this case, merits an “exceptional case” finding.

17 **3. The Court Should Award Fees Defendants Incurred**
18 **Defending Against Perfect 10’s State-Law Claims.**

19 **a. California Law Mandates an Award of Fees on**
20 **Perfect 10’s Publicity Claims.**

21 Under California law, the right of publicity arises from two sources: Civil
22 Code Section 3344 and California case law.³ Section 3344 mandates recovery of
23 attorney fees by the prevailing party. Cal. Civ. Code § 3344(a) (“[t]he prevailing
24 party in any action under this section shall . . . be entitled to attorney’s fees and
25 costs”); *see also Love v. Associated Newspapers, Ltd.* (“*Love II*”), 611 F.3d 601,

26 support a finding a plaintiff’s case exceptional, including asserting an objectively
27 unreasonable claim, ignoring a clear defense, or disregarding orders of the court.
28 *See Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 816 (9th Cir. 2003);
Laskay v. New Line Cinema Corp., 230 F.3d 1367 (9th Cir. 2000).

³ Perfect 10 alleged violations of the right of publicity under both the California
statute and common law. *See* Dkt. 1 at ¶¶ 72-78.

614 (9th Cir. 2010); *Love I*, 2007 WL 2709975, at *2 (J. Collins) (Section 3344 “renders an award of attorneys’ fees mandatory”); *Kirby v. Sega of Am., Inc.*, 144 Cal. App. 4th 47, 62 (2006) (“The mandatory fee provision in section 3344 subdivision (a) leaves no room for ambiguity”). Where a plaintiff bases a common-law claim for a publicity rights violation on the same alleged unauthorized use as its statutory Section 3344 claim, the claims are “inextricably intertwined,” and a court will not apportion costs between them. *Love I*, 2007 WL 2709975, at *3.

In this case, Perfect 10 based both its common-law and its statutory publicity claims on the same allegations. *See* Dkt. 1 at ¶¶ 72-78. The Court rejected both claims on the same basis, holding Defendants immune from them under the CDA, 47 U.S.C § 230. Dkt. No. 97 at 22-24.⁴ Because Perfect 10’s publicity claims were inextricably intertwined, the Court should award Defendants all their fees on these claims as the prevailing parties.

b. The Court Should Award Fees Defendants Incurred Defending Against the Unfair Competition Law Claim to the Extent It Was Intertwined with Other Claims.

Attorneys’ fees are not generally recoverable under the California’s unfair competition law. *Walker v. Countrywide Home Loans, Inc.*, 98 Cal. App. 4th 1158, 1180 (2002) (“[W]here a plaintiff sues solely under the unfair competition law, fees may not be recovered by a prevailing defendant.”). Nevertheless, “if a plaintiff does not bring suit solely under the unfair competition law, the trial court has discretion to apportion fees to claims not brought pursuant to that law—as long as those claims authorize attorney fees awards.” *Id.* at 1180. Further, “[a]ppportionment is not required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney’s time into compensable and noncompensable units.” *Graciano v.*

⁴ That Defendants won on the basis of preemption does not defeat their entitlement to fees. *See Lewis v. Activision Blizzard, Inc.*, No. C 12-1096 CW, 2014 WL 4953770, at *2 (N.D. Cal. Sept. 25, 2014) (“[t]he fact that [a Section] 3344 claim [is] preempted by federal law does not preclude an award of [Section] 3344 attorneys’ fees to the prevailing party”).

1 *Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 159 (2006).

2 Here, Defendants have eliminated from their request 5% of all time entries
3 during the pendency of the unfair competition claim, reflecting their best estimate
4 of the approximate total amount of attorney time attributable to that claim. Bridges
5 Decl. ¶¶ 55-56. Other than these reductions, Defendants and their counsel cannot
6 segregate the work counsel performed to defend against Perfect 10's unfair
7 competition law claim from other claims, especially from the right of publicity
8 claims which arise from similar allegations and resulted in dismissal on the same
9 basis. *Compare* Dkt. 1 at ¶¶ 72-78, *with id.* at ¶¶ 64-71; *see also* Dkt. 11-1 at 26-
10 32; Dkt. No. 97 at 22-24.

11 **B. The Fees and Expenses That Defendants Request Are Reasonable.**

12 In determining an appropriate attorney fees award, courts employ the lodestar
13 method. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939
14 (1983). The district court must first determine the presumptive lodestar figure by
15 multiplying the number of hours reasonably expended on the litigation by a
16 reasonable hourly rate. *Id.* After determining the presumptive lodestar fee, the
17 court may adjust the award either up or down using factors that are not part of the
18 lodestar determination itself, including (i) time limitations imposed by the client or
19 other circumstances; (ii) the amount at issue and the results counsel obtained; (iii)
20 the experience, reputation, and ability of the attorneys; (iv) the desirability of the
21 case; (v) the nature and length of the professional relationship with the client; and
22 (vi) awards in similar cases. *Van Asdale v. Int'l Game Tech.*, No. 3:04-cv-00703-
23 RAM, 2011 WL 2118637, at *2 (D. Nev. May 24, 2011) (citing factors in *Kerr v.*
24 *Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), and explaining that
25 other factors that *Kerr* cited have since become part of the lodestar analysis or have
26 fallen out of favor with the Ninth Circuit).

1 **1. The Rates of Defendants’ Counsel Are Reasonable In Light**
2 **of the Nature of this Case.**

3 Rates are reasonable if they are “in line with those prevailing in the
4 community for similar services by lawyers of reasonably comparable skill,
5 experience and reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11, 104 S. Ct.
6 1541, 1547 (1984); *see also Welch v. Metropolitan Life Ins. Co.*, 480 F.3d 942, 946
7 (9th Cir. 2007) (holding that reasonable rates should be determined “by reference to
8 the fees that private attorneys of an ability and reputation comparable to that of
9 prevailing counsel charge their paying clients for legal work of similar
10 complexity.”) (internal citation omitted). “Generally, when determining a
11 reasonable hourly rate, the relevant community is the forum in which the district
12 court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).
13 Justification of the rates may rest upon evidence that clients in fact pay the rates
14 sought, attorney affidavits regarding prevailing rates in a community, other cases
15 determining the rates to be reasonable, and survey evidence regarding the fees of
16 comparable counsel. *See Lakim Indus., Inc. v. Linzer Prods. Corp.*, No. 2:12-cv-
17 04976, 2013 WL 1767799, at *8 (C.D. Cal. Apr. 24, 2013). Here each type of
18 evidence establishes the reasonableness of Defendants’ counsel’s rates.

19 First, the ability of counsel to command a particular rate from paying clients
20 is itself evidence of reasonableness. *See Moore v. Jas. H. Matthews & Co.*, 682
21 F.2d 830, 840 (9th Cir. 1982) (“Unless counsel is working outside his or her normal
22 area of practice, the billing-rate multiplier is, for practical reasons, usually
23 counsel’s normal billing rate.”). Here both Fenwick & West and Winston &
24 Strawn charged Giganews the standard rates for a case within the firms’ usual
25 practice areas, and Giganews paid those rates. *See Bridges Decl.* ¶ 15.

26 Moreover, the rates are in line with the rates that comparable law firms
27 charge. *See Declaration of Peter Zeughauser* ¶¶ 9-11. Mr. Zeughauser, an expert
28 regarding attorney billing rates in the Central District of California, has considered

1 both Fenwick & West and Winston & Strawn's respective rates in this case and
2 concluded that they are in line with prevailing rates in the community. *See id.* ¶¶ 1-
3 11. Given his knowledge of legal fees charged in the Central District,
4 Mr. Zeughauser's conclusion that hourly rates Defendants paid in this case reflect
5 prices for the sort of legal work in Los Angeles establishes that those rates are
6 reasonable.

7 Moreover, a number of courts in the Central District and elsewhere have
8 recognized the reasonableness of the rates at issue. In *Mattel, Inc. v. MGA Entm't,*
9 *Inc.*, the Central District awarded fees for legal work in a complex copyright case
10 performed at rates ranging from \$360 to \$985 an hour. 2011 WL 3420603 at *9
11 (C.D. Cal. Aug. 4, 2011).⁵ Courts routinely award fee awards to both Fenwick &
12 West and Winston & Strawn based on the actual fee charged to the client,
13 recognizing that the fees charged are reasonable for the skill level of counsel and
14 the complexity of work performed. *See, e.g., IPVX Patent Holdings, Inc. v.*
15 *Voxernet LLC*, No. 5:13-cv-01708, 2014 WL 5795545, at *7-8 (N.D. Cal. Nov. 6,
16 2014) (awarding full fees and noting the reasonableness of Fenwick & West rates);
17 *In re Rossco Holdings, Inc.*, No. CV-14-917-JFW, 2014 WL 2611385 (C.D. Cal.
18 May 30, 2014) (affirming conclusion of bankruptcy court that rates charged by
19 Winston & Strawn reflected reasonable rates in the Central District of California).⁶
20 This Court too should treat these rates as reasonable.

21 Finally, survey evidence also supports the reasonableness of the rates
22 Defendants paid. According to a survey performed by Valeo Partners, a consulting

23
24 ⁵ Although the *Mattel* court did not specify the billing rates it awarded, Defendants
25 submit the declaration used to support the fees request that identifies those rates and
ask the Court to take judicial notice of that filing. Bridges Decl., Ex. 2 [Zeughauser
Mattel Declaration].

26 ⁶ Numerous courts have also approved Fenwick's historical rates as reasonable. *See*
27 *Yue v. Storage Tech Corp.*, No. C-07-05850 JW (EDL), 2008 U.S. Dist. LEXIS
68920, at *13-14 (N.D. Cal. Aug. 6, 2008) *adopted by* 2008 U.S. Dist. LEXIS
68801 (N.D. Cal. Sept. 5, 2008); *Netbula v. Chordiant Software, Inc.*, No. 5:08-cv-
28 00019-JW, Dkt. 594 (N.D. Cal. Dec. 17, 2010); *Jones v. Corbis Corp.*, No. CV 10-
8668-SVW CWX, 2011 WL 4526084 (C.D. Cal. Aug. 24, 2011).

1 firm that monitors legal billing rates, senior partners in AmLaw 100 firms charged
2 an average of \$894 per hour in 2014. *See* Bridges Decl. ¶ 45, Ex. 3. The rate for
3 Mr. Bridges' time as Giganews's lead counsel is consistent with a range that this
4 market average reflects. The Valeo survey also indicates that AmLaw 100 firms
5 charged an average of \$527 per hour for associate time, which is again in line with
6 the rates that Fenwick & West charged Giganews. Because the rates charged in this
7 case are consistent with those that comparably experienced counsel in the field
8 charge, the Court should treat the rates of Defendants' counsel as reasonable.

9 **2. Defendants' Attorneys Worked a Reasonable Number of**
10 **Hours.**

11 To determine the reasonable hours worked in winning this case, Defendants
12 began with the total hours worked and took a conservative approach, striking or
13 reducing time entries where the work could be viewed as duplicative or took longer
14 than one might reasonably expect. *See* Bridges Decl. ¶ 46. Reductions include:

- 15 • Removing all "write-off" or "no-charge" billing entries that counsel in
16 exercising billing discretion did not charge to the clients.
- 17 • Ensuring the request reflects all courtesy discounts counsel gave to the
18 clients during the course of the case.
- 19 • Not seeking reimbursement for the time of certain attorneys or staff members
20 who performed limited tasks on the case.
- 21 • Eliminating from the request all work performed by Winston & Strawn from
22 June 2012 on, in light of the fact that Mr. Bridges had moved to Fenwick &
23 West and Winston & Strawn eventually withdrew as counsel.
- 24 • Allocating 5% of all litigation tasks to the unfair competition claim before its
25 dismissal and excluding that amount from Defendants' fee request. While
26 some courts might treat those general tasks as "inextricably intertwined" with
27 the other issues and therefore recoverable, Defendants have provided a more
28 conservative allocation to ensure their request does not include the work

1 related to that claim.

- 2 • Striking miscellaneous other individual time entries in the judgment of
3 Defendants' counsel to reflect a conservative approach to this request.

4 Bridges Decl. ¶¶ 46-49, 56 & Exs. 6-7. Together, these reductions total
5 \$276,950.84. *See id.*

6 The resulting request falls within a reasonable range of the number of hours
7 that a case of this magnitude and complexity requires. As discussed above, Perfect
8 10's intransigence and misconduct substantially increased the scope of work. There
9 have been nearly six hundred and fifty docket entries in this case. To date,
10 Defendants have prevailed (either in full or in substantial part) on twenty-six of the
11 thirty substantive motions the Court has decided (two others became moot, and two
12 remain pending). Bridges Decl. Ex. 1 [Motion Scorecard].

13 Finally, at no point did Perfect 10 give Defendants any opportunity to
14 conclude the litigation for less than they expended in fees. To the contrary, for
15 years Perfect 10 alleged infringements that if proven could result in well over \$1
16 billion in statutory damages, but it refused to identify the actual amount it sought.
17 Only very late in the case, in expert discovery, did Perfect 10 theorize that the
18 settlement value of the case was \$51,103,897. Bridges Decl. Ex. 9.

19 **C. The Court Should Also Award Reasonable Expenses.**

20 The Copyright Act entitles Defendants as prevailing parties to recover their
21 full costs in addition to fees. 17 U.S.C. § 505; *Twentieth Century Fox Film Corp. v.*
22 *Entm't Distrib.*, 429 F. 3d 869, 885 (9th Cir. 2005) (Section 505 authorizes an
23 award of non-taxable costs in addition to fees). While Defendants have submitted a
24 Bill of Costs in accordance with the requirements of Local Rule 54,⁷ they also now
25 seek an award of their non-taxable expenses. As set forth in Mr. Bridges'

26
27 ⁷ Defendants have not included in this motion any of the taxable costs identified in
28 their Bill of Costs. Nevertheless, to the extent the Clerk determines any such costs
are not taxable, Defendants request the Court award them as a part of their
expenses. Dkt. 635[Application to Tax Costs].

1 declaration, counsel necessarily incurred these expenses in the course of providing
2 legal services and counsel typically bills these expenses separately to the client
3 apart from attorney hours. Bridges Decl. ¶ 59. The expenses include out-of-pocket
4 costs associated with its attorneys' taking of deposition testimony (including
5 videotaping and transcribing the depositions and the travel expenses to attend
6 them), computerized legal research charges; courier, document production, and
7 copying costs. *Id.* Courts have consistently recognized these as recoverable
8 expenses. *See Trustees of Constr. Indus. v. Redland Ins. Co.*, 460 F.3d 1253, 1258-
9 59 (9th Cir. 2006) ("growing circuit consensus" that "reasonable charges for
10 computerized research may be recovered as attorneys' fees); *Davis v. City and*
11 *Cnty. Of San Francisco*, 976 F.2d 1536, 1556 (9th Cir. 1992) (out-of-pocket
12 expenses including the travel, courier and copying costs); *Wyatt Tech. Corp. v.*
13 *Malvern Instruments, Inc.*, No. CV 07-8298 ABC (RZx), 2010 U.S. Dist. LEXIS
14 144973, at *8-9 (N.D. Cal. June 17, 2010), *aff'd*, 526 Fed. Appx. 761 (9th Cir.
15 2013); *Pastre v. Weber*, 800 F. Supp. 1120, 1123, 1127 (S.D.N.Y. 1991)
16 (photocopying, messenger services, contract printing, travel); *In re Broadcom*
17 *Corp. Sec. Litig.*, No. SACV 01-275, 2005 U.S. Dist. LEXIS 41993, at * 27-28
18 (C.D. Cal. Sept. 12, 2005) (court reporting and video in connection with
19 depositions).

20 IV. CONCLUSION

21 In the circumstances of this extraordinary case, Defendants ask the Court to
22 grant the motion; award Defendants **\$6,104,372.66** in fees and **\$436,634.97** in
23 expenses; and set a date for Defendants to supplement their request with later fees
24 and costs for inclusion in a final award.

1 Dated: December 29, 2014

FENWICK & WEST LLP

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3 By: /s/Andrew P. Bridges
4 Andrew P. Bridges

5 Attorneys for Defendants
6 GIGANEWS, INC., and
7 LIVEWIRE SERVICES, INC.
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